84-725

No. _____

In The
Supreme Court of the United States
October Term, 1984

SNAPPER POWER EQUIPMENT,
a division of Fuqua Industries, Inc.,

Petitioner,

vs.

PATRICIA J. WOOD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

The petitioner, McDonough Power Equipment Company, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on November 7, 1983 on the following issues:

1. Both the District Court and the Court of Appeals ignored dispositive decisions of the Kansas Supreme Court, contrary to 28 U.S.C. Section 1652. Petitioner's substantive right to a trial in accordance with the substantive law of the State of Kansas was denied, requiring a new trial.

2. The Court of Appeals appears to apply a double standard in assessing the severity of alleged trial errors against Petitioner and others similarly situated. Only invocation of the Supreme Court's power of supervision can alter this practice.

3. The rule applied by the Court of Appeals in the present case is contrary to the rule stated in other decisions of the Tenth Circuit Court of Appeals and other courts of appeal. The Supreme Court should therefore accept certiorari to resolve this dispute.

PARTIES

Since the trial of this case, Petitioner's corporate identity has changed. Petitioner is now the Snapper Power Equipment Division of Fuqua Industries, Inc., a Delaware corporation.

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OPINIONS BELOW

The opinion of the U.S. Court of Appeals is reproduced in the appendix at App. 1. The order of the Court of Appeals denying Petitioner's petition for rehearing is reproduced in the appendix at App. 8.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on November 7, 1983. A timely petition for rehearing was filed on November 21, 1983. The petition for rehearing was denied on July 17, 1984. This petition has been filed within ninety (90) days subsequent to the denial of the petition for rehearing. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1) (1976).

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I. STATEMENT OF THE CASE

This case is a personal injury action involving injuries suffered by the plaintiff, Patricia Wood, when a riding lawnmower operated by plaintiff fell from a retaining wall onto a flight of stairs. Plaintiff suffered injuries to her foot and leg from contact with the lawnmower blade. Plaintiff claimed that her injuries were caused by defects in the lawnmower, and filed suit in the U.S. District Court for the District of Kansas, where the accident occurred. Jurisdiction in the District Court was based on diversity of citizenship pursuant to 28 U.S.C. Section 1332.

Suit was filed not only against the defendant lawnmower manufacturer but also against the individual owners of the lawnmower operated by the plaintiff. Plaintiff sought to recover against the individual owners on a theory of common law negligence for failing to inform plaintiff of the alleged defects in the lawnmower when providing it for her use. Up to the time of trial common law negligence claims were made against all parties, with an

alternative claim based upon common law strict liability against the defendant manufacturer.

The case was tried to a jury between April 12 and April 16, 1982, in the United States District Court for the District of Kansas sitting in Kansas City, Kansas. There was conflicting evidence presented at trial concerning the facts surrounding plaintiff's accident. According to plaintiff's testimony, she was engaged in mowing the lawn at an apartment structure owned by the individual defendants on the day of the accident. A portion of the lawn to be mowed was adjacent to a concrete stairway, and was divided from the stairway by a retaining wall. Plaintiff testified that she stopped the mower a short distance away from the retaining wall, and was propelled over the edge of the retaining wall when she released the clutch to start the mower moving forward again. She alleged that the front end of the mower raised off the ground (a phenomenon described by expert witnesses as "lift-off") which resulted in the loss of steering ability. At some point during the fall, plaintiff's left foot came into contact with the rotating lawnmower blade, resulting in her injuries.

Two other witnesses testified that Mrs. Wood did not stop, but instead drove over the side of the retaining wall while her attention was distracted to her rear. These witnesses testified that Mrs. Wood was looking back over her left shoulder at the time of the accident, and simply drove off the edge of the retaining wall through inadvertance.

In spite of this substantial evidence of contributory negligence on the part of the plaintiff, the trial court refused all suggestions by the defendant for jury instructions and evidentiary rulings premised on plaintiff's con-

tributory negligence. The court advised counsel for all parties that these rulings would be made if counsel for plaintiff would amend his contentions and proceed solely on a theory of strict liability against the defendant manufacturer. Plaintiff's counsel took the court's advice and announced his decision to proceed against the defendant manufacturer on a strict liability theory only. This announcement was made only after the close of plaintiff's evidence.

The defendant manufacturer was not allowed to introduce evidence to rebut the inference of negligent conduct created by plaintiff's case in chief due to these rulings. The defendant manufacturer was prohibited from showing the nature and quality of its conduct in designing and selling the lawnmower because the court felt that these issues do not belong in a strict liability case. At the same time the jury was allowed to hear evidence relating to the reasonableness of the individual defendants' conduct. This double standard was re-emphasized in the court's instructions to the jury. The jury was instructed to consider the plaintiff's possible failure to exercise ordinary care only in respect to the claims against the individual defendants. The jury was expressly instructed to ignore all of plaintiff's conduct except her actual awareness of the alleged defects in the lawnmower in determining the liability of the defendant manufacturer. These instructions effectively directed the jury to ignore the testimony contradicting plaintiff's version of the accident in assessing fault, unless the jury found the individual defendants negligent.

The District Court Judge had only three months earlier received answers from the Kansas Supreme Court to

a certified question propounded under the Uniform Certification of Questions of Law Act, K.S.A. 60-3201, et seq. The District Court Judge had on his desk the opinion in *Forsythe v. Coats Company, Inc.*, 230 Kan. 553, 639 P.2d 43 (1982), informing him that the Kansas Comparative Negligence Act applies in strict liability actions contrary to the assumptions underlying the instructions given to the jury in this case. The law as stated in the opinion of the Kansas Supreme Court was not applied, however.

Plaintiff's ordinary negligence was undoubtedly in issue since the pretrial order listed her acts of negligence as claimed by the defendant manufacturer. Counsel also strenuously objected to the court's refusal to allow the consideration of lack of ordinary care. At no time did plaintiff's counsel suggest on the record that a contributory negligence instruction would be improper. The District Court denied the defendant's request of its own volition without any comment from plaintiff's counsel.

The erroneous refusal to instruct on contributory negligence was compounded by numerous other errors in the instructions including an improper definition of product defect and an erroneous standard for finding that the product was unreasonably dangerous, which is required by Kansas law.

The jury returned a special verdict finding no liability on the part of the individual defendants and liability based on the theory of strict products liability against the defendant manufacturer. The jury apportioned 49% fault to plaintiff and 51% fault to defendant McDonough Power Equipment Company, Inc. The individual defendants were not found negligent. Plaintiff's total damages were as-

sessed at $105,000.00. Judgment was entered on June 1, 1982 in favor of plaintiff for 51% of the total damages ($53,550.00), in accordance with the Kansas Comparative Negligence Statute, K.S.A. 60-258a.

Under the Kansas statute a finding of 50% fault or more on the part of the plaintiff would have required a judgment for the defense. The jury finding of 49% fault on plaintiff's part presumably represents a finding that plaintiff was aware of whichever alleged defect was found to be present, in accordance with the Court's instructions. The jury also presumably ignored plaintiff's lack of ordinary care in failing to keep a proper lookout, as required by the instructions..

Both Plaintiff and Defendant McDonough moved for a new trial alleging error in the Court's instructions on the fault of the parties. Defendant's motion also alleged numerous other grounds The motions for a new trial were denied in the same order entering judgment in favor of plaintiff.

The defendant manufacturer appealed. Plaintiff did not cross appeal the denial of her motion for new trial. The individual defendants were not parties to the appeal. Oral arguments were presented to the Tenth Circuit Court of Appeals in Denver, Colorado on August 1, 1983. A written opinion was issued by the three judge panel on November 7, 1983.

The opinion of the Tenth Circuit Court of Appeals upheld the decision of the District Court despite the uncontrovertable errors in evidentiary rulings and jury instructions. The decisions of the Kansas Supreme Court, the U.S. District Court for the District of Kansas, and of the Tenth Circuit Court of Appeals confirming the appli-

cability of ordinary contributory negligence principles in strict liability cases were simply ignored. The exclusion of otherwise admissible evidence intended to rebut the implication of wrongful conduct on the part of the manufacturer were apparently excused as harmless error. The Court of Appeals opinion implies that exclusion of such testimony was proper because some evidence was presented on the subject. The opinion of the Court of Appeals was not designated for publication.

On the very same day that this unpublished opinion was issued the Tenth Circuit Court of Appeals issued the published opinion in *Prince v. Leesona Corporation,* 720 F.2d 1166 (10th Cir. 1983). The *Prince* case also involved questions concerning comparative fault in product liability actions tried under Kansas law. The decision reached in the *Prince* case was diametrically opposed to the result in the present case and in accord with Kansas decisions. On petition for rehearing this obvious inconsistency was pointed out to the court. The Court of Appeals was also informed that the Kansas Court of Appeals had expressed approval of the interpretation followed in the *Prince* case. The Court of Appeals was invited to resolve any ambiguity in the law by certifying one or more questions to the Kansas Supreme Court.

The petition for rehearing was taken under advisement for a period in excess of eight months. Despite this opportunity for review and research to confirm the inconsistency of the two opinions issued on the same day and the virtual certainty that the result in the present case was erroneous, the petition for rehearing was denied.

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II. REASONS FOR GRANTING THE PETITION

1. Both the District Court and the Court of Appeals ignored dispositive decisions of the Kansas Supreme Court, contrary to 28 U.S.C. Section 1652. Petitioner's substantive right to a trial in accordance with the substantive law of the State of Kansas was denied, requiring a new trial.

2. The Court of Appeals appears to apply a double standard in assessing the severity of alleged trial errors against Petitioner and others similarly situated. Only invocation of the Supreme Court's power of supervision can alter this practice.

3. The rule applied by the Court of Appeals in the present case is contrary to the rule stated in other decisions of the Tenth Circuit Court of Appeals and other courts of appeal. The Supreme Court should therefore accept certiorari to resolve this dispute.

This is a renewal of a complaint previously voiced by this Petitioner in *McDonough Power Equipment, Inc. v. Greenwood,* — U.S. —, 78 L.Ed.2d 663, 104 S.Ct. — (1984). The Tenth Circuit Court of Appeals has neglected the substantive rights of Petitioner and others similarly situated. In the present case repeated erroneous decisions assisted the plaintiff in obtaining a favorable verdict. Further erroneous interpretations of state law were required to uphold the verdict on appeal. Even though the trial errors were obvious and significant, the judgment in favor of the sympathetic party was not disturbed.

Certiorari should be granted due to the seriousness of the violation of Petitioner's right to a trial under the

same principles of law which would apply in state court. The decisions of the District Court and the Court of Appeals create a distinct body of federal common law in diversity cases, contrary to the Rules of Decision Act.

In a diversity case federal courts are required to follow state law on substantive issues pursuant to the Rules of Decision Act, 28 U.S.C. Section 1652. An ordinary common law product liability action involving an injury to a Kansas resident arising from a Kansas accident is therefore to be governed by the law of the State of Kansas. The District Court in this case refused to follow the clearly announced law of the State of Kansas in its conduct of the trial. The Court of Appeals sanctioned this conduct in an opinion that it refused to designate for publication. The result reached was diametrically opposed to the published opinions of the Tenth Circuit Court of Appeals on the same subject. The Court of Appeals was made aware that the unpublished opinion is contrary both to its own published opinions and to state law, yet refused to rehear the matter after being expressly informed of the conflict between this decision and all other published decisions.

On January 15, 1982, nearly three months before trial commenced at the District Court level, the Kansas Supreme Court issued its opinion in *Forsythe v. Coates Company, Inc., supra.* The *Forsythe* opinion was an answer to a question certified by Judge Earl E. O'Connor, Chief Judge of the U.S. District Court for the District of Kansas, and the judge presiding over the trial in the present case. The question to be answered involved the applicability of the Kansas Comparative Negligence Act, K.S.A. 60-258a, to actions based upon common law strict liability. The Kansas Supreme Court informed Judge

O'Connor that the Comparative Negligence Act was to be applied to strict liability actions in its entirety, without modification or alteration. The opinion of the Kansas Supreme Court held that common law strict liability under Kansas law was to be treated as the equivalent of common law negligence, for purposes of applying the Comparative Negligence Act. Ordinary driver negligence could be compared causatively with strict liability.

The Trial Court had more than two months in which to read this opinion and was presumably aware when trial commenced in this case on April 12, 1982 that Kansas law prohibited special treatment of questions of fault in strict liability cases. Despite this knowledge the trial Judge instructed counsel for the parties that he was prepared to give special dispensation to plaintiff and to limit the defenses available to the petitioner if only the claim of common law negligence against petitioner were dropped. The claim was dropped, and rulings depriving petitioner of defenses based on comparative fault followed.

Other Kansas District Court Judges clearly perceived the status of the law of Kansas at the same time. For example, in *Miller v. Johns-Manville Sales Corp.*, 538 F. Supp. 631 (D.C. Kan. 1982) decided on April 14, 1982 during the midst of the trial in the present case, District Judge Theis had the following comments:

> In Kansas, despite continued reference of Section 402A [of the Restatement 2d Torts], and invocation of the doctrine of strict liability, strict product liability is dead. *Whether you compare negligence or fault, the distinction is in reality abolished.* Under strict liability certain conduct of persons using, or exposed to, a product, could behave in foreseeable yet 'negligent' ways, and not have their recovery reduced.

> The theory was that manufacturers and suppliers were supposed to protect those people from their own ignorance and their own folly, because the manufacturers and suppliers had superior knowledge and were better able to act to protect the people who would come in contact with the products; and because it was determined as a matter of social policy the costs were more appropriately allocated to society at large and to the manufacturers and suppliers, rather than to the lone unfortunate individual who had been injured. *Comparative fault, as applied in Kansas, no longer allocates the risks in that manner.* See, e.g., *Lester v. Magic Chef, Inc.*, 230 Kan. 643, 541 P.2d 353 (1982). (Emphasis supplied).

The only reason stated for the trial court's refusal to follow the opinions of the Kansas Supreme Court was the then newly published decision in *Rexrode v. American Laundry Press Co.*, 674 F.2d 826 (10th Cir. 1982), cert. denied 459 U.S. 862, 74 L.Ed.2d 117, 103 S.Ct. 137 (1982). That decision of the Tenth Circuit Court of Appeals opined incorrectly that Kansas would continue to distinguish between common law strict liability and common law negligence. The District Court therefore chose to accept the opinion of the Tenth Circuit Court of Appeals in preference to the explicit stated answer of the Kansas Supreme Court to a certified question. There can be no more blatant violation of the Rules of Decision Act.

Later in 1982 even the Tenth Circuit Court of Appeals recognized that Kansas law makes no distinction between common law negligence and strict liability insofar as comparative fault issues are concerned. In *Hardin v. Manitowoc-Forsythe Corporation*, 691 F.2d 449 (10th Cir. 1982), the Tenth Circuit Court of Appeals held in an opinion written by Justice McKay that contributory fault of all

kinds on the part of all participants to an accident must be considered in a Kansas product liability case. The *Hardin* decision was cited in Petitioner's brief in the present case. Despite the existence of the *Hardin* case, the *Miller* decision, the *Forsythe* case, and numerous other decisions by both state and federal courts reaching the same conclusion, the Tenth Circuit Court of Appeals in this case ignored the stated law of Kansas by refusing to recognize the errors of the trial court. The Court of Appeals instead chose to rely upon the outdated *Rexrode* decision, despite having repudiated *Rexrode* in the *Hardin* case.

On the very same day as this court held that no error was committed by refusing to instruct on contributory negligence, the Tenth Circuit Court of Appeals published its decision in *Prince v. Leesona Corporation, supra.* The *Prince* decision affirmed the earlier holding in *Hardin* to the effect that lack of ordinary care was a submissible defense in a Kansas product liability action.

Petitioner has repeatedly called these incomprehensible conflicts to the attention of the Tenth Circuit Court of Appeals, without any explanatory response. Instead Petitioner's motions are rejected without opinions. This is not the first time that this Petitioner has voiced this objection to an opinion of the Tenth Circuit Court of Appeals. Only last year Petitioner successfully petitioned for review of the Tenth Circuit decision in another lawnmower case, reported as *McDonough Power Equipment, Inc. v. Greenwood, supra.* The *McDonough* case also involved a situation where lack of ordinary care on the part of a lawnmower operator and others was allowed as a defense in a strict product liability action under Kansas law. Nor is this the first time that other product liability defend-

ants have felt aggrieved by similar rulings. In *Rexrode v. American Laundry Press Company, supra,* an unsuccessful petition for certiorari was filed. The rationale for the *Rexrode* opinion was later implicitly admitted to be erroneous in the *Hardin* case, *supra,* but of course this did not retrieve the $750,000.00 plus interest paid by the defendant in that case.

Justice is not done when the District Court and the Circuit Court of Appeals admit their error a year or two after erroneously affirming a judgment for tens or hundreds of thousands of dollars against a defendant who should have been granted a new trial. Although civil actions are customarily treated as of less significance than criminal prosecutions, it should be kept in mind that the amounts in controversy far exceed any fines imposed in the typical criminal prosecution. While it is regrettable that occasionally vast sums of money change hands due to unwise decisions or erroneous interpretations, such serious results never should occur because the law has been shaped expressly to favor one class of litigants over another.

The unwillingness of the Tenth Circuit Court of Appeals to afford equal justice to those who can "afford to pay" is best illustrated by comparing the opinion in the present case to the very recent product liability decision of *Robinson v. Audi NSU Auto Union,* 739 F.2d 1481 (1984). The case was previously reviewed by the U.S. Supreme Court as *World Wide Volkswagen v. Woodson,* 444 U.S. 286, 62 L.Ed.2d 490, 100 S.Ct. 559 (1981). In that case a plaintiff was permitted a new trial against the defendant automobile importer, even though a verdict in favor of the defendant automobile manufacturer was up-

held. A new trial was ordered because evidence technically admissible against the defendant importer but inadmissible against the defendant manufacturer had been excluded by the trial court. The *Robinson* opinion makes no analysis whatever concerning harmless error or the substantiality of the trial court's error. The plaintiff's right to a new trial was deemed to be automatic, once it was shown that some admissible evidence had been excluded. Unlike *Robinson* in the present case the Tenth Circuit Court of Appeals has held that the exclusion of whole volumes of testimony tending to rebut an inference of wrongful conduct is harmless because some testimony which might tangentially have addressed that point was admitted. Either no standard is being followed, or two separate and irreconcilable standards are being applied.

The actual mental processes of the various members of the Tenth Circuit Court of Appeals are of course outside the knowledge of Petitioner. Neither the presence or absence of subjective goodwill, nor the individual motives of justices should be the determinant in any case. But where the pattern of treatment of certain litigants is otherwise inexplicable and apparently irrational, subjective prejudice can be inferred. The 1981 opinion in *Rexrode, supra,* could have been viewed as an isolated instance of error. But the subsequent unreasonable treatment of this Petitioner in *Greenwood,* followed by the repudiation of the *Rexrode* decision in *Hardin,* when viewed in light of subsequent decisions consistently applying a different standard of review where the rights of product liability defendants are involved demonstrates a disturbing pattern of unequal consideration for the rights of litigants. The unwillingness of the Circuit Court of Appeals to refer

any claimed ambiguity to the Kansas Supreme Court by certification as suggested by Petitioner suggest a subjective unwillingness to follow the Rules of Decision Act as one possible explanation.

Review of this case is also mandated by the objective failure of the Tenth Circuit Court of Appeals to follow any one rule of law in determining whether trial errors are of sufficient significance to warrant a new trial. The Tenth Circuit Court of Appeals apparently still follows a standard of presumptive error and prejudice in cases where certain plaintiffs seek a new trial, and presumptive harmlessness where certain defendants complain, contrary to the rule of *McDonough Power Equipment v. Greenwood, supra.* Despite *Greenwood,* the Tenth Circuit Court of Appeals granted a new trial for a plaintiff who could show no abuse of discretion and no substantial prejudice in *Robinson v. Audi NSU, supra.* Some plaintiffs are still allowed new trials on demand, while many of the most grievous errors committed against defendants are ignored as in the present case.

The showing of error made by Petitioner in this case has been held to be more than sufficient to require a new trial by other circuit courts. For example, instructions erroneously distinguishing between contributory negligence and assumption of the risk required a new trial in *Casper v. Barber & Ross Company,* 288 F.2d 379 (D.C. Cir. 1961). It has also been held that jury instructions which failed to set out the contentions made by the parties deprived the jury of any rational ability to apply abstract principles of law to the facts, in *Swietlowich v. County of Bucks,* 610 F.2d 1157 (3rd Cir. 1979). The general rule followed by most courts is stated in *Bass v. International*

Brotherhood of Boiler Makers, 630 F.2d 1058 (5th Cir. 1980):

> Only if the trial judge's instructions to the jury, taken as a whole, give a misleading impression or inadequate understanding of the law and issues to be resolved, is a new trial required.
> 630 F.2d at 1062.

There can be no question that this standard has been met in the present case. The Court's jury instructions taken as a whole required the jury to differentiate between the defendants in determining the validity of affirmative defenses. The jury was expressly instructed that the plaintiff's ordinary contributory negligence was to be considered only as it related to the liability of the individual defendants, and was to be ignored in comparing fault against the Petitioner. Had the jury been instructed to consider plaintiff's conduct in the same light without regard to the identity of the defendant found liable, a different apportionment of fault would probably have resulted. A change of a single percentage point in the apportionment of negligence would have made the difference between a verdict for plaintiff and a verdict for defendant.

The evidentiary rulings were of equal significance. Plaintiff's half of the trial was conducted under principles of negligence, and evidence of Petitioner's alleged negligence was admitted. But when plaintiff rested the Court's suggestion that the law of the case be changed was accepted by the plaintiff and the remainder of the trial proceeded on a strict liability theory. Defendant was therefore prohibited from introducing any evidence of the nature and quality of its own conduct to rebut the inference of culpability presented by plaintiff's evidence. The

jury was therefore required to compare defendant's conduct as described in plaintiff's evidence against plaintiff's conduct as described in plaintiff's evidence. The jury was never allowed to hear petitioner's description of its own conduct or any evidence on that subject, and was instructed to ignore all evidence of Petitioner's version of plaintiff's conduct. Petitioner was literally deprived of any ability to defend itself against plaintiff's case. The decision to change the rules of law to be applied to the case during the middle of the trial resulted in two separate and distinct trials wherein Petitioner's evidence simply could not relate to or respond to plaintiff's evidence. The jury of course had no alternative but to consider Petioner's lack of rebuttal evidence significant, resulting in a high proportion of fault assessed against Petitioner.

III. CONCLUSION

What is at stake in this case is not just a few thousand dollars. What is at stake here is the consistency of the federal court system's role in hearing disputes between citizens of different states. If the only complaint that could be made was that an incorrect conclusion was reached, this petition would never be filed. What is at issue is the objective appearance of inequality in the treatment of lititgants in the Tenth Circuit Court of Appeals and its subsidiary courts. If any other remedy were available which did not require the limited time and resources of the United States Supreme Court that remedy would be sought. The Tenth Circuit Court of Appeals has refused all other remedies to Petitioner, however, including the

preferred method of a rehearing en banc or certification to the Kansas Supreme Court. Petitioner therefore respectfully requests that this Petition for Certiorari be granted so that the obligations imposed by the Rules of Decision Act can be discharged.

Respectfully submitted,

/s/ Donald Patterson
DONALD PATTERSON AND
STEVE R. FABERT
Counsel for Petitioner,
McDonough Power Equipment, Inc.

APPENDIX

NOT FOR ROUTINE PUBLICATION

(Filed November 7, 1983)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 82-1790

PATRICIA J. WOOD and IVAN WOOD,

Plaintiffs-Appellees,

vs.

McDONOUGH POWER EQUIPMENT, INC.
a Fuqua Industry Corporation,

Defendant-Appellant.

Appeal from the United States District Court
For the District of Kansas
(D.C. No. CIV-77-2228)

Ronald R. Holliger, Kansas City, Missouri, for Plaintiffs-Appellees.

Steve R. Fabert, of Fisher, Patterson, Sayler & Smith, Topeka, Kansas, for Defendant-Appellant McDonough Power Equipment, Inc.

Before HOLLOWAY and SEYMOUR, Circuit Judges, and BOHANON, Senior District Judge*

BOHANON, District Judge

On June 5, 1976, plaintiff Patricia J. Wood sustained injuries when the Snapper riding lawn mower she was operating plunged over a retaining wall and rolled down

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*Honorable Luther Bohanon, Northern, Eastern and Western Districts of Oklahoma, sitting by designation.

a flight of concrete steps. The Snapper mower involved in the accident was designed, manufactured, and sold by the appellant-defendant McDonough Power Equipment, Inc. (hereinafter McDonough). The mower was owned by various individuals doing business as the Barcelona West Apartments. Plaintiff-Appellee filed both a negligence cause of action against the owners of the apartments, and a cause of action sounding in strict liability against McDonough.

The strict liability action was prosecuted on multiple theories of liability. One theory was based on the fact that a design defect was present in the mower which produced a "lift off" of the front wheels under certain operating conditions which resulted in complete loss of steering ability. The plaintiff also presented the theory that a design defect existed due to the lack of a "quick stop" mechanism to protect against blade contact in the event the mower tipped or rolled over. Finally, Mrs. Wood alleged that a warning defect existed for failure to advise of the "lift off" and "quick stop" defects.

The case was tried to a jury in April, 1982. After a five-day trial, the jury returned a special verdict of no liability on the part of the apartment owner but liability against the defendant manufacturer. The jury, applying the Kansas law of comparative fault, assessed 49 percent contributory fault against the plaintiff and 51 percent of the fault against McDonough. After apportionment of the fault, the plaintiff was rendered judgment in the amount of $53,500 ($105,000 actual damages).

Defendant McDonough appeals asserting three basic errors. First, McDonough argues that the district court erred in refusing to retroactively apply the provisions of

the Kansas Product Liability Act (K.S.A. 1981 Supp. 60-3301 et seq.). Second, the appellant contends that the court erred when it refused to allow the defense of contributory negligence to the strict liability action in light of the Kansas law regarding the doctrine of comparative fault. And third, defendant McDonough claims the trial court erred by excluding evidence of compliance with industry standards.

Kansas Product Liability Act

After this case began and the pretrial order was filed, the Kansas Product Liability Act was passed by the Kansas Legislature. This Act contained provisions regarding the manufacturer's duty to warn. K.S.A. 1981 Supp. 60-3305. In pertinent part the statute reads:

> "60-3305. *Manufacturer's or sellers' duty to warn or protect against danger, when.* In any product liability claim any duty on the part of the manufacturer or seller of the product to warn or protect against a danger or hazard which could or did arise in the use or misuse of such product, and any duty to have properly instructed in the use of such product shall not extend: (a) To warnings, protecting against or instructing with regard to safeguards, precautions and actions which a reasonable user or consumer of the product, with the training, experience, education and any special knowledge the user or consumer did, should or was required to possess, could and should have taken for such user or consumer or others, under all the facts and circumstances;
>
> (b) to situations where the safeguards, precautions and actions would or should have been taken by a reasonable user or consumer of the product similarly situated exercising reasonable care, caution and procedure; or (c) to warnings, protecting against or instructing with regard to dangers, hazards or risks

> which are patent, open or obvious and which should have been realized by a reasonable user or consumer of the product."

McDonough filed a motion to add defenses based on this provision of the Kansas Product Liability Act. The motion was denied without written opinion. Later, the denial of the motion was alleged as grounds for a new trial, but the argument was again rejected. At that time, the trial court expressed its reasoning in denying the motion. It stated in its Memorandum of June 1, 1982:

> "First, McDonough claims that the court erred in excluding the defenses based upon the Kansas Product Liability Act, KSA 60-3301, et seq. We held that the Act was not retroactive and declined to apply it to cases arising before its effective date. We adhere to our previous ruling that the Act has no application to this case, and refer again to *Chamberlain v. Schmutz Manufacturing Co., Inc.*, 532 F.Supp. 588 (D. Kan. 1982)."

McDonough argues that two defenses were denied the defendants. First, the risk of blade contact in the event of roll-over or tip-over is a hazard which is patent, open or obvious and requires no warning. Second, subsection (b) would give a certain additional defense to the alleged duty to warn of the apartment owners.

Upon examination of the record, this court finds appellant's arguments to be groundless—all form and no substance. There simply is no error flowing from the denial of the retroactive application of the Kansas Product Liability Act. The "new" defense alleged to have been available to the apartment owners simply is not at issue due to their favorable judgment. McDonough's "new" defense of no duty to warn of obvious hazard is simply not a new defense. This provision of the Act is but a recodi-

fication of existing law and was previously pled and proven at trial. *See Mays v. Ciba-Geigy Corp.*, 233 Kan. 38, 661 P.2d 348 (1983). In fact, instruction No. 15 given by the trial court included this specific defense. The instruction stated in part:

> "No warning is necessary if the danger to which the user is exposed is known to him or is readily apparent to him."

This court cannot consider purely legal arguments having no effect on the outcome of the substantive issues. The denial of the retroactive application of the Kansas Product Liability Act cannot lead to a finding of error by the trial court under the facts presented. To consider the arguments of the appellant where the relief sought would result in the same instructions as those given would be to abuse our function. It is well recognized that federal courts do not render mere advisory opinions. *Norvell v. Sangre de Cristo Development Co., Inc.*, 519 F.2d 370 (10th Cir. 1975). There is no requirement for the court to reach the issue of retroactive application of the Kansas Product Liability Act.

Comparative Fault

The appellant argues that the trial court erred in its instruction of the jury on the law of comparative fault as applied to strict liability actions. However, the arguments lack any merit. Upon review of the instructions given by the trial court, it is clear that he specifically addressed all defenses properly raised by the appellant and incorporated the language of the most current pattern jury instructions of Kansas regarding comparative fault (Pattern Instruction of Kansas 13.23). *See Hardin v. Manitowoc-Forsythe Corp.*, 691 F.2d 449 (10th Cir. 1982).

At no time was any evidence as to the relative fault of the plaintiff disallowed during trial. In fact, the best indication that the jury understood the legal issues involved in the assessment of comparative fault is demonstrated in the jury finding of 49 percent causal liability of the plaintiff.

Industry Standards

During the trial of this action, McDonough sought to introduce evidence tending to show compliance with voluntary industry design standards for lawn mowers. However, on April 14 during trial and before presentation of this evidence, the opinion in *Rexrode v. American Laundry Press Company,* 674 F.2d 826 (10th Cir. 1982) was issued and directly addressed the admissibility of voluntary safety standards. The trial court, with agreement of counsel, properly found *Rexrode* dispositive of the issue and disallowed evidence of compliance with industry standards.

Subsequently however, the language contained in the original slip opinion upon which the trial court relied was modified and reissued on April 22, 1982. The appellant contends that the language as modified in the *Rexrode* opinion significantly changed the law to be applied as to the relevancy of evidence tending to show compliance with industry standards. We disagree, the change in language in the *Rexrode* case is one for clarification not substantive change in the legal position originally taken. In the original slip opinion, a statement was made that manufacturer compliance with industry standards are irrelevant in a strict liability case. However upon review, the court realized this language was too sweeping and modified the statement to read in final form:

> "[M]anufacturer compliance with industry standards is generally considered to be irrelevant in a strict liability case." 674 F.2d at 831.

The statement was tempered to reflect that the use of industry standards to prove the unavailability of technology to design a safer product would be relevant and proper. As *Rexrode* stated later in the opinion:

> "The second prong of defendant's argument for admitting the 1972 ANSI standard relates to feasibility, a factor which we would agree is extremely relevant in a design defect determination. Manufacturers are not to be held strictly liable for failure to design safety features, if the technology to do is unavailable at the time the product is made." 674 F.2d at 832

The modified language of *Rexrode* only clarified the proper use of evidence tending to show compliance with industry standards in a strict liability trial. The test of relevancy, as is always the case, is one based upon the intended use of the proffered evidence. Upon examination of the trial testimony, it is clear that the court correctly applied the rules as to admissibility of industry standards. The court limited the use of industry standards to the subject of the feasibility of remedial safety designs. Despite repeated objections *by the plaintiff,* the court allowed testimony as to the feasibility of safety features in light of the historical safety standards and practices. The court can determine no instance where prejudice to the defendant occurred due to a denial of presentation of evidence tending to show compliance with industry standards. Therefore, the argument advanced by the appellant that the trial court improperly applied the law as announced in *Rexrode* is totally without merit.

AFFIRMED.

MAY TERM—July 17, 1984

Before Honorable William J. Holloway, Jr., Honorable Stephanie K. Seymour, Circuit Judges, and Honorable Luther L. Bahanon, District Judge

No. 82-1790

PATRICIA J. WOOD and IVAN WOOD,

Plaintiffs-Appellees,

vs.

MCDONOUGH POWER EQUIPMENT, INC., a FUQUA INDUSTRY,

Defendant-Appellant.

LOUIS POZEZ, S. LEE POZEZ, ABBOTT J. SHERR, ISAK FEDERMAN, all individually and d/b/a BARCELONA WEST APARTMENTS,

Defendants.

This matter comes on for consideration of appellant's petition for rehearing filed in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied.

HOWARD K. PHILLIPS, Clerk

/s/ Robert L. Hoecker
Chief Deputy Clerk

NOT FOR ROUTINE PUBLICATION

(Filed Nov. 7, 1983)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 82-1790

PATRICIA J. WOOD and IVAN WOOD,

Plaintiffs-Appellees,

vs.

McDONOUGH POWER EQUIPMENT, INC.,
a Fuqua Industry Corporation,

Defendant-Appellant.

Appeal from the United States District Court
For the District of Kansas

(D.C. No. CIV-77-2228)

Ronald R. Holliger, Kansas City, Missouri, for Plaintiffs-Appellees.

Steve R. Fabert, of Fisher, Patterson, Sayler & Smith, Topeka, Kansas, for Defendant-Appellant McDonough Power Equipment, Inc.

Before HOLLOWAY and SEYMOUR, Circuit Judges, and BOHANON, Senior District Judge*

BOHANON, District Judge

On June 5, 1976, plaintiff Patricia J. Wood, sustained injuries when the Snapper riding lawn mower she was operating plunged over a retaining wall and rolled down

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*Honorable Luther Bohanon, Northern, Eastern and Western Districts of Oklahoma, sitting by designation.

a flight of concrete steps. The Snapper mower involved in the accident was designed, manufactured, and sold by the appellant-defendant McDonough Power Equipment, Inc. (hereinafter McDonough). The mower was owned by various individuals doing business as the Barcelona West Apartments. Plaintiff-Appellee filed both a negligence cause of action against the owners of the apartments, and a cause of action sounding in strict liability against McDonough.

The strict liability action was prosecuted on multiple theories of liability. One theory was based on the fact that a design defect was present in the mower which produced a "lift off" of the front wheels under certain operating conditions which resulted in complete loss of steering ability. The plaintiff also presented the theory that a design defect existed due to the lack of a "quick stop" mechanism to protect against blade contact in the event the mower tipped or rolled over. Finally, Mrs. Wood alleged that a warning defect existed for failure to advise of the "lift off" and "quick stop" defects.

The case was tried to a jury in April, 1982. After a five-day trial, the jury returned a special verdict of no liability on the part of the apartment owner but liability against the defendant manufacturer. The jury, applying the Kansas law of comparative fault, assessed 49 percent contributory fault against the plaintiff and 51 percent of the fault against McDonough. After apportionment of the fault, the plaintiff was rendered judgment in the amount of $53,500 ($105,000 actual damages).

Defendant McDonough appeals asserting three basic errors. First, McDonough argues that the district court

erred in refusing to retroactively apply the provisions of the Kansas Product Liability Act (K.S.A. 1981 Supp. 60-3301 et seq.). Second, the appellant contends that the court erred when it refused to allow the defense of contributory negligence to the strict liability action in light of the Kansas law regarding the doctrine of comparative fault. And third, defendant McDonough claims the trial court erred by excluding evidence of compliance with industry standards.

Kansas Product Liability Act

After this case began and the pretrial order was filed, the Kansas Product Liability Act was passed by the Kansas Legislature. This Act contained provisions regarding the manufacturer's duty to warn. K.S.A. 1981 Supp. 60-3305. In pertinent part the statute reads:

> "60-3305. *Manufacturer's or sellers' duty to warn or protect against danger, when.* In any product liability claim any duty on the part of the manufacturer or seller of the product to warn or protect against a danger or hazard which could or did arise in the use or misuse of such product, and any duty to have properly instructed in the use of such product shall not extend: (a) To warnings, protecting against or instructing with regard to safeguards, precautions and actions which a reasonable user or consumer of the product, with the training, experience, education and any special knowledge the user or consumer did, should or was required to possess, could and should have taken for such user or consumer or others, under all the facts and circumstances;
>
> (b) to situations where the safeguards, precautions and actions would or should have been taken by a reasonable user or consumer of the product similarly situated exercising reasonable care, caution and

> procedure; or (c) to warnings, protecting against or instructing with regard to dangers, hazards or risks which are patent, open or obvious and which should have been realized by a reasonable user or consumer of the product."

McDonough filed a motion to add defenses based on this provision of the Kansas Product Liability Act. The motion was denied without written opinion. Later, the denial of the motion was alleged as grounds for a new trial, but the argument was again rejected. At that time, the trial court expressed its reasoning in denying the motion. It stated in its Memorandum of June 1, 1982:

> "First, McDonough claims that the court erred in excluding the defenses based upon the Kansas Product Liability Act, KSA 60-3301, et seq. We held that the Act was not retroactive and declined to apply it to cases arising before its effective date. We adhere to our previous ruling that the Act has no application to this case, and refer again to *Chamberlain v. Schmutz Manufacturing Co., Inc.*, 532 F.Supp. 588 (D. Kan. 1982)."

McDonough argues that two defenses were denied the defendants. First, the risk of blade contact in the event of roll-over or tip-over is a hazard which is patent, open or obvious and requires no warning. Second, subsection (b) would give a certain additional defense to the alleged duty to warn of the apartment owners.

Upon examination of the record, this court finds appellant's arguments to be groundless—all form and no substance. There simply is no error flowing from the denial of the retroactive application of the Kansas Product Liability Act. The "new" defense alleged to have been available to the apartment owners simply is not at issue due to their favorable judgment. McDonough's "new" de-

fense of no duty to warn of obvious hazard is simply not a new defense. This provision of the Act is but a recodification of existing law and was previously pled and proven at trial. *See Mays v. Ciba-Geigy Corp.,* 233 Kan. 38, 661 P.2d 348 (1983). In fact, instruction No. 15 given by the trial court included this specific defense. The instruction stated in part:

> "No warning is necessary if the danger to which the user is exposed is known to him or is readily apparent to him."

This court cannot consider purely legal arguments having no effect on the outcome of the substantive issues. The denial of the retroactive application of the Kansas Product Liability Act cannot lead to a finding of error by the trial court under the facts presented. To consider the arguments of the appellant where the relief sought would result in the same instructions as those given would be to abuse our function. It is well recognized that federal courts do not render mere advisory opinions. *Norvell v. Sangre de Cristo Development Co., Inc.,* 519 F.2d 370 (10th Cir. 1975). There is no requirement for the court to reach the issue of retroactive application of the Kansas Product Liability Act.

Comparative Fault

The appellant argues that the trial court erred in its instruction of the jury on the law of comparative fault as applied to strict liability actions. However, the arguments lack any merit. Upon review of the instructions given by the trial court, it is clear that he specifically addressed all defenses properly raised by the appellant and incorporated the language of the most current pattern

jury instructions of Kansas regarding comparative fault (Pattern Instruction of Kansas 13.23). *See Hardin v. Manitowoc-Forsythe Corp.*, 691 F.2d 449 (10th Cir. 1982). At no time was any evidence as to the relative fault of the plaintiff disallowed during trial. In fact, the best indication that the jury understood the legal issues involved in the assessment of comparative fault is demonstrated in the jury finding of 49 percent causal liability of the plaintiff.

Industry Standards

During the trial of this action, McDonough sught to introduce evidence tending to show compliance with voluntary industry design standards for lawn mowers. However, on April 14 during trial and before presentation of this evidence, the opinion in *Rexrode v. American Laundry Press Company*, 674 F.2d 826 (10th Cir. 1982) was issued and directly addressed the admissibility of voluntary safety standards. The trial court, with agreement of counsel, properly found *Rexrode* dispositive of the issue and disallowed evidence of compliance with industry standards.

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> "The second prong of defendant's argument for admitting the 1972 ANSI standard relates to feasibility, a factor which we would agree is extremely relevant in a design defect determination. Manufacturers are not to be held strictly liable for failure to design safety features, if the technology to do so is unavailable at the time the product is made." 674 F.2d at 832.

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tation of evidence tending to show compliance with industry standards. Therefore, the argument advanced by the appellant that the trial court improperly applied the law as announced in *Rexrode* is totally without merit.

AFFIRMED.

MAY TERM—July 17, 1984

Before Honorable William J. Holloway, Jr., Honorable Stephanie K. Seymour, Circuit Judges, and Honorable Luther L. Bohanon, District Judge

No. 82-1790

PATRICIA J. WOOD and IVAN WOOD,

Plaintiffs-Appellees,

vs.

McDONOUGH POWER EQUIPMENT, INC., a FUQUA INDUSTRY,

Defendant-Appellant,

LOUIS POZEZ, S. LEE POZEZ, ABBOTT J. SHERR, ISAK FEDERMAN, all individually and d/b/a BARCELONA WEST APARTMENTS,

Defendants.

This matter comes on for consideration of appellant's petition for rehearing filed in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied.

HOWARD K. PHILIPS, Clerk

/s/ Robert L. Hoecker
Chief Deputy Clerk

No. 84-725

In the Supreme Court of the United States

October Term, 1984

McDONOUGH POWER EQUIPMENT, INC.,
a Fuqua Industry Corporation,
Petitioner,

vs.

PATRICIA J. WOOD,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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No. 84-725

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

I.

STATEMENT OF THE CASE

Petitioner has persisted in its unrelenting efforts to misstate the facts, omit significant facts, and draw impliedly uncontroverted conclusions from the facts. Despite Petitioner's continued reference to "conflicting evidence" the transcript clearly showed the claimed contrary testimony to be in fact consistent with Respondent's explanation of how her accident occurred. Respondent's cause was submitted to the jury against Petitioner upon the strict liability theories of design defect which produced a lift-off of the front wheels and therefore loss of steering ability,

design defect due to lack of a quick stop mechanism to protect against blade contact in the event that the mower tipped or rolled over and finally a failure to warn of these defects. No witness testified, as Petitioner claims, that Respondent simply drove over the wall through inadvertence. One witness was either unsure of how exactly the incident occurred or supported Respondent's testimony that the lift-off phenomenon had occurred. The other was only certain that the mower had gone over the wall at an angle in the area Respondent described as the location of the accident.

Petitioner complains shrilly that in spite of evidence of Respondent's contributory negligence the trial court "refused all *suggestions* by the defendant for *jury instructions* and it" to submit its claimed defense (Petition for Writ of Certiorari pages 3 to 4) (emphasis added). Neither the Tenth Circuit Court of Appeals nor this Court has ever been favored by Petitioner with any specific reference to a proffered but refused instruction or offered but excluded evidence concerning Respondent's conduct or actions in the operation and use of Petitioner's lawnmower.

The only evidence which was excluded by the trial court and of which Petitioner complained to the Tenth Circuit dealt with Petitioner's compliance with voluntary industry safety standards for lawnmowers. As the Tenth Circuit noted (App. 7) evidence as to the "feasibility of safety features in light of historical safety standards and practices" was introduced over this Respondent's repeated objections.

Petitioner's complaint must apparently be based upon some claimed prejudice by reason of Respondent's abandonment at the close of her case of the alternative theory of negligence in favor of a theory of strict liability. But

what error did that selection of alternative theories of liability produce? Surely Petitioner does not suggest that a defendant may introduce evidence or submit instructions concerning legal theories which are not part of the cause ultimately submitted to the jury. Rather the argument must be that somehow Petitioner is prejudiced because a plaintiff abandons a theory at the close of his case after introducing evidence to support that theory. Petitioner does not, however, point to any evidence of its negligence that was presented by Respondent in her case or demonstrate how it would be harmed thereby once the theory has been abandoned. Petitioner complains of a double standard being applied by the trial court and the Tenth Circuit (Petition for Writ of Certiorari page 4). However, its only real complaint is that the individual defendants and Respondent's *misconduct* were at issue while Petitioner was restricted from presenting affirmative evidence of the *absence* of negligence on its part.

II.

REASONS FOR NOT GRANTING THE PETITION

The use of Certiorari is wisely and necessarily limited to cases where a real and embarrassing conflict in opinion and authority exists between the Circuits, *NLRB v. Pittsburgh S.S. Company,* (1951) 340 U.S. 498, 95 L.Ed. 479, 71 S.Ct. 453, and for those occasions where the Supreme Court's power of supervision should be properly exercised.

Petitioner complains that the District Court and Tenth Circuit ignored the application of the Kansas Comparative Negligence Act, K.S.A. 60-258a, to strict liability actions as required by *Forsythe v. Coats Company, Inc.,* 230 Kan. 553, 639 P.2d 43 (1982). Petitioner's complaint, however, is

obviated by the verdict itself which reduced Respondent's claim by forty-nine percent (49%) based upon her conduct in the operation of the lawnmower. If the Comparative Negligence Act had not been applied by the District Court there would have been no basis for any reduction of Respondent's damages. Of course, in the usual strict liability case the conduct of the plaintiff (except in limited circumstances amounting to assumption of the risk) would in the absence of application of comparative negligence or fault principles have no relevance and in no way affect the verdict or amount. At no place, however, in the formal trial record itself, in any motion for new trial, or in its brief to the Tenth Circuit, or Petition for Writ of Certiorari to this Court has Petitioner pointed to any specific objection to an instruction given by the District Court. As the Tenth Circuit noted (App. 5) the District Court incorporated the language of the most recent pattern jury instructions utilized by Kansas state courts. Though Petitioner complains elsewhere that the Tenth Circuit ignored its own opinion in *Hardin v. Manitowoc-Forsythe Corporation*, 691 F.2d 449 (10th Cir. 1982), that opinion in fact instructed the Federal District Courts in Kansas to utilize instructions such as submitted by the trial court herein until further direction or refinement by decisional law.

In *Kennedy v. City of Sawyer*, 4 Kan.App.2d 545, 608 P.2d 1379, reversed 228 Kan. 439, 618 P.2d 788 (1980) and in *Albertson v. Volkswagenwerke Aktiengesellschaft*, 230 Kan. 368, 634 P.2d 1127 (1981), Kansas appellate courts discussed the meaning and application of comparative negligence principles to strict liability or non-negligence actions. After the *Kennedy* decision the Pattern Instructions of Kansas (PIK) were modified to incorporate comparative negligence principles into strict liability actions. The revised language of PIK 13.23 was substantially followed

by the District Court herein in its instruction number 17. Moreover, instruction number 19 required the jury to determine "whether Plaintiff (Respondent) was also at fault" and "the extent to which each of the parties may have played a role in causing plaintiff's injuries and resulting damages."

Petitioner urges as its initial basis for Certiorari that the District Court and the Tenth Circuit (1) ignored dispositive decisions of the Kansas Supreme Court and (2) the Tenth Circuit opinion conflicted with other Tenth Circuit opinions. The first contention is that the decision of the Kansas Supreme Court in *Forsythe, supra,* was ignored.

As Petitioner has done repeatedly in briefs and motions to the District Court, the Tenth Circuit and now to this Court it has blatantly, if unintentionally, misconstrued, distorted or frankly misstated the holdings and reasonings of various judicial opinions. The question certified in *Forysthe did not,* as claimed by Petitioner, ask whether the Kansas Comparative Negligence Act applies in strict liability cases. As the Kansas Supreme Court itself discussed in *Forsythe,* application of the principles incorporated in that Act to strict liability had been recognized by Kansas Courts in 1980 and in fact predicted by the Kansas Federal District Courts even before that time. The issue in *Forsythe* was much narrower: having applied comparative fault principles to strict liability actions should it be applied as pure comparative fault or modified comparative fault such as utilized by the Kansas Comparative Negligence Act. In the modified system a plaintiff is barred if his fault exceeds forty-nine percent (49%). The issue presented in *Forsythe* is obviously not present in this case. Respondent frankly cannot comprehend Petitioner's misunderstanding of the extremely precise question presented and answered in *Forsythe.*

Although Respondent hesitates to accuse any party of paranoia she can find no other palatable explanation for the language, implications and innuendos contained in the Petition for Certiorari. She finds shocking the suggestion that the District Court (which itself certified the question in *Forsythe*) was aware that *Forsythe* required particular rulings in this case but nevertheless decided to "give special dispensation to plaintiff" (Petition for Certiorari page 10) and "blatantly" violated the Rules of Decision Act, 28 U.S.C. Section 1652, by choosing to accept the Tenth Circuit Opinion "in perference to the explicit stated answer of the Kansas Supreme Court to a certified question" (Petition for Certiorari page 11). Petitioner next proceeds to contend that the Tenth Circuit compounded the error by ignoring its own decision in *Hardin, supra,* and persisted in ignoring the law, by relying upon its own "outdated" and "repudiated" decision in *Rexrode v. American Laundry Press Co.*, 674 F.2d 826 (10th Cir. 1982), cert. denied 459 U.S. 862, 74 L.Ed.2d 117, 103 S.Ct. 137 (1982) (Petition for Certiorari page 12). Petitioner's paranoia apparently extends to the Tenth Circuit as well since that Court "repeatedly" and "without explanatory response" has ignored these "incomprehensible conflicts" (Petition for Certiorari page 12).

Strong and vituperative language is, however, no substitute for legal analysis and argument. As indicated above Petitioner argues that the District Court relied on *Rexrode* rather than the applicable Kansas Supreme Court decision. Despite repeated readings of the *Rexrode* opinion Respondent can discern no issue, discussion or holding in that case concerning the application of comparative fault principles to strict liability actions. The only issue in *Rexrode* at all related to this cause, involved the admissibility of compliance with voluntary industry standards. It must there-

fore be Petitioner's theory that application of comparative fault to strict liability actions requires the admission of compliance with voluntary industry standards. Respondent cannot discern that the counsel representing both this Petitioner and the defendant in *Rexrode* made any argument there that comparative fault made such standards admissible or that the *Rexrode* Court so ruled. Moreover, though Petitioner claims that *Rexrode* has been repudiated by *Hardin* a thorough reading of the *Hardin* decision reveals (1) *Rexrode* is never mentioned in that decision and (2) that no issue regarding the admission of industry safety standards is present.

Respondent's difficulty with Petitioner's arguments regarding application of comparative fault (which difficulties were apparently shared by the Tenth Circuit) is that they are academic and semantical and are never related by Petitioner to the admission/exclusion of evidence or the giving/refusal of a jury instruction (App. 5-6). Although the thrust of Petitioner's argument must be directed toward *Respondent's duty of care,* it never points to any evidence offered or excluded regarding Respondent's conduct but only to its own rejected evidence of its own exercise of due care (by means of showing compliance with industry safety standards). Similarly, Petitioner never refers to any instruction it offered concerning what it claims to be the proper application of comparative fault in a Kansas strict liability action; nor does it refer to any specific objection to the instructions given by the District Court. The reason for that failure is obvious and even fatal to Petitioner's argument. Instructions given followed the Kansas Pattern Instructions and addressed all properly raised issues (App. 13-14).

For many of these same reasons Petitioner's contention that the Tenth Circuit opinion herein conflicts with

its own opinion in *Prince v. Leesona Corporation*, 720 F.2d 1166 (10th Cir. 1983) is in error. Once again no issue is presented in *Prince* concerning the admission of any testimony or jury instruction that was either contrary to the Court's opinion herein or applied comparative fault differently than the District Court and Tenth Circuit did herein. *Prince* involved a strict liability claim wherein the defendant manufacturer claimed the plaintiff was contributorily at fault. On appeal the plaintiff claimed instructional error and argued that assumption of the risk only and not negligence was to be compared to the defendant's fault. Properly rejecting that argument under Kansas Law the Tenth Circuit approved instructions (see footnote 11 at page 1172) that are substantially identical to the instructions given by the same District Court in this cause in referring to a plaintiff's unreasonable use of the product.

Respondent is somewhat at a loss as how to respond to the broadsword of Petitioner's attack upon the Tenth Circuit Court of Appeals in numerous cases other than the one present before this Court. Though she does not believe it to be her right let alone her duty to defend the opinions involved in those cases she cannot ignore assertions utilized to secure Certiorari herein that the Tenth Circuit has "shaped (the law) expressly to favor one class of litigants over another" and is unwilling "to afford equal justice to those who can 'afford to pay' " (Petition for Certiorari page 13). If an entire Circuit Court of Appeals is prejudiced against certain litigants, follows a standard of presumptive harmlessness where certain defendants complain and ignores "the most grievous errors committed against defendants" while allowing plaintiffs "new trials on demand" then most certainly the exercise of this Court's supervisory jurisdiction

is required. Respondent does not believe, however, that because Petitioner is dissatisfied with the results in this case (and apparently many others) that the Tenth Circuit is incapable of or even worse, unwilling to interpret and apply the law properly and fairly.

Even though carefully reasoned and specific response to issues concealed by emotional claims of prejudice and unequal treatment are difficult Respondent will undertake the endeavor. It would seem the Petitioner's complaints can be even further refined to contend that the Tenth Circuit has applied an erroneous and inconsistent standard with regard to the severity of alleged trial error (1) arising from the exclusion of certain evidence (compliance with voluntary industry standards) (2) the giving of instructions concerning the relative duties of parties in a strict liability case.

Petitioner strives to conceal and distort the issue regarding admissibility of compliance with voluntary industry safety standards. Petitioner repeatedly diverts attention from the evidentiary nature of the issue and casts it in terms of a state substantive law issue governed by the Rules of Decision Act. Regardless of how the issue is cast, Petitioner's argument must be rejected. It fails to anywhere demonstrate or explain how a state rule or statute requiring comparison of plaintiff's conduct with that of the manufacturer in a strict liability case compels the introduction of evidence to show the *manufacturer's* exercise of due care by compliance with minimum voluntary industry safety standards. To accept Petitioner's argument would be to lower the manufacturer's duty to whatever level the industry to which it belongs establishes for itself. It would totally abolish the doctrine of strict liability. Yet Petitioner points to no Kansas decision abolishing that doctrine or even questioning the higher duties it places upon the

manufacturer than a theory of negligence. Nor does Petitioner cite *any* Kansas opinion or other case permitting the introduction of compliance with voluntary industry safety standards in an action based upon strict liability. Rather Petitioner claims that it is somehow prejudiced because plaintiff elected to abandon negligence theories and proceed upon strict liability.

It is difficult to perceive how the exclusion of evidence bearing upon a theory upon which the jury was not instructed can harm Petitioner, particularly where the abandoned theory imposed a lower standard of care upon the manufacturer than does the strict liability theory. As the Tenth Circuit noted (App. 7) the trial court *permitted* the use of industry safety standards upon the subject of feasibility of remedial safety designs as approved in *Rexrode, supra.* Though Petitioner claims that *Rexrode* was repudiated by *Hardin, supra,* the latter case did not involve admissibility of evidence of compliance with industry safety standards. Nor does any other decision cited and relied upon by Petitioner involve that issue. Respondent can therefore find no basis for Petitioner's claim that the Tenth Circuit ignored either its own decisions or violated the Rules of Decision Act by ignoring Kansas decisions establishing the substantive law of the case.

Petitioner's reliance upon *Robinson v. Audi NSU Auto Union,* 739 F.2d 1481 (1984), is similarly unavailing. Clearly that case involved the exclusion of evidence necessary to satisfy and relevant to the plaintiff's burden of proof against one of the defendants. Extensive discussion of the substantiality or harmlessness of error seems unnecessary where the evidence is clearly admissible against one defendant and is excluded only because not admissible

against a co-defendant. The distinction between *Robinson* and this cause is even more striking when the evidence is considered in light of the burden of proof in that cause and the issues submitted to the jury. In this case the excluded evidence dealt with an issue not before the jury (Petitioner's negligence) and would only tend to prove Petitioner's exercise of due care which is not, of course, a defense or issue in a strict liability case.

Petitioner's last contention relating to claimed instructional error must also fail. As Petitioner admits the general rule requires not perfection but will compel reversal,

> "[O]nly if the trial judges' instructions to the jury, taken as a whole, give a misleading impression or inadequate understanding of the law or issues to be resolved . . ."

Bass v. International Brotherhood of Boiler Makers, 630 F.2d 1058 (5th Cir. 1980). Certainly Petitioner cannot claim that Respondent's comparative fault was not submitted to the jury since forty-nine percent (49%) of the responsibility was assigned to her by the jury. Its complaint must therefore be with the form and language of the submission. The Petitioner has never directed the attention of the District Court, the Tenth Circuit Court of Appeals or the Supreme Court to any different form of instruction it offered or to any specific objection at trial to any particular instruction. Federal Rule of Civil Procedure 51 reads in relevant part:

> "[N]o party may assign as error the giving or failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

Nor has Petitioner *ever* advanced to the trial court, the Tenth Circuit or this Court any instruction which would have corrected the alleged defects. Having failed to do so he cannot claim error. *Priggins v. Wilkinson,* 296 F.2d 74 (10th Cir. 1961); see also Federal Jury Practice and Instruction by Devitt and Blackmar, Section 703 at page 216.

The proper test on appellate review is whether the jury was misled in any way and whether it understood the issues. *Divorskin v. Rollins, Inc.,* 634 F.2d 285 (5th Cir. 1980). One of the instructions specifically attacked by Petitioner in the Tenth Circuit directs the jury to consider reasonable use of the product by Respondent, that is, whether the manner of her use of the product was appropriate, and to consider her conduct in determining the contributory fault of the Respondent. See *Hardin, supra,* for the approval of similar language in another strict liability case. Nor does Petitioner point to any Kansas Pattern Instruction or Kansas Appellate decision requiring the use of different language for the presentation of the plaintiff's comparative fault in a strict liability case. As the Tenth Circuit itself noted the language of the instructions utilized by the District Court followed the Kansas Pattern Instruction.

CONCLUSION

Petitioner's arguments for this Court's grant of Certiorari are all rhetoric and no substance. Petitioner fails, as it did in the Tenth Circuit, to ever explain or demonstrate any error material to the proceedings in the District Court, let alone one which was capable of affecting the merits of the cause or Petitioner's substantial procedural rights. Petitioner's complaints are really only with the result—the jury's conclusion. Rhetoric and allegations of prejudice by the District Court and the Tenth Circuit not supported by any substantial error in the cause are not a sufficient basis for a grant of Certiorari.

Respectfully submitted,

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